## HOOD OSMAN v. HONG LEONG FINANCE BHD

HIGH COURT MALAYA, KUALA LUMPUR
HASNAH MOHAMMED HASHIM J
[BANKRUPTCY NO: 29-2909-05-2013]
26 JANUARY 2016

***BANKRUPTCY:*** *Receiving and adjudication orders – Granting of – Appeal against – Whether Registrar correct in refusing adjournment proceedings of creditor's petition and proceeding with it – Whether debtor submitted scheme of arrangement or composition satisfactory to creditors – Whether s. 24(2) of the Bankruptcy Act 1967 complied with – Whether creditor's petition challenged by judgment debtor – Whether Registrar applied correct law when making receiving and adjudication orders simultaneously – Bankruptcy Act 1967, s. 15(1) – Bankruptcy Rules 1969, r. 150(2)*

***BANKRUPTCY:*** *Creditor's petition – Adjournment of – Application for – Refusal of – Whether Registrar correct in refusing adjournment of creditor's petition and proceeding with it – Whether debtor submitted scheme of arrangement or composition satisfactory to creditors – Whether s. 24(2) of the Bankruptcy Act 1967 complied with – Whether creditor's petition challenged by judgment debtor – Bankruptcy Act 1967, s. 15(1) – Bankruptcy Rules 1969, r. 150(2)*

The judgment debtor ('JD') was granted a RM80.1 million syndicated term loan by six financial institutions which included the judgment creditor ('JC'). The JD, however, defaulted and the JC initiated an action against the JD for the sum due and owing against the JD ('Kuala Lumpur High Court Suit'). Subsequently, a consent judgment ('CJ') was entered in the aforesaid suit between the parties. The JD failed to satisfy the terms of the said CJ, thus the JC proceeded with the bankruptcy proceedings against the JD. The JC filed an application for the issuance of the bankruptcy notice ('Bankruptcy Notice'). Subsequently, the JC filed a creditor's petition ('CP') which was duly served on the JD. The hearing of the CP, however, was adjourned several times on the grounds that the parties (the JD and the other syndicated lenders) were attempting to resolve the matter amicably. On 3 August 2015, *ie*, the date for the final hearing of the CP, the JD again applied for an adjournment of the hearing of the CP, which was objected by the JC. The Registrar refused the application for an adjournment of the matter for the simple reason that the hearing of the CP had been adjourned twelve times based on the same reason. The Registrar then proceeded with the hearing of the CP and granted receiving order and adjudication order (RO/AO) simultaneously against the JD. Dissatisfied, the JD filed an appeal against the said decision.

**Held (dismissing appeal with costs):**

**(1)** Section 24(1) of the Bankruptcy Act 1967 ('BA') stipulates that at the time of making the RO, the court shall adjudge the debtor bankrupt, unless the debtor can show to the satisfaction of the court that he is in

A a position to offer a composition or scheme of arrangement satisfactorily to his creditors. In the instant case, no scheme of arrangement or composition satisfactory to the creditors was ever presented or submitted as evidence before the Registrar as required under s. 24(2) BA. In the circumstances, the Registrar was right in refusing the
B adjournment proceedings with the CP and proceeding with the CP. (paras 16, 17 & 22)

**(2)** Section 15(1) of the BA and r. 150(2) of the Bankruptcy Rules 1969 does not prohibit the Registrar from making an adjudication order immediately after the RO had been made. At the hearing of the CP, the
C JD's offer to settle was not accepted by the JC and the other syndicated lenders. The JD did not make any attempt to provide any information to satisfy the court that there was a proposed scheme of arrangement. The CP was supported by an affidavit verifying the CP and the Registrar had relied on the said affidavit to prove the debt owing. Furthermore,
D the JD did not even challenge the CP and the affidavit verifying. Thus, the Registrar had applied the correct law and did not err when she made the RO and the AO simultaneously. (paras 23-25)

**Case(s) referred to:**

*Go Pak Hoong Tractor and Building Construction v. Syarikat Pasir Perdana [1981] 1 LNS*
E *184 FC **(refd)***

*J Raju M Kerpaya v. Commerce International Merchant Bankers Bhd [2000] 3 CLJ 104 CA **(refd)***

*Re Mat Shah Safuan, Ex p United Asian Bank Bhd [1990] 1 LNS 115 HC **(refd)***

**Legislation referred to:**

F Bankruptcy Act 1967, ss. 3(1), (2)(ii), 4, 15(1), 24(1), (2)
Bankruptcy Rules 1969, rr. 114(1), 150(1), (2)

*For the judgment debtor/appellant - John A Skelchy, Hilwa Bustam & Vishal Kumar; M/s James Monteiro*

*For the judgment creditor/respondent - Kenenth Seet & CB Loh; M/s Lee Hishamuddin*
G *Allen & Gledhill*

*For the Director-General of Insolvency - Ishi, Nurul & Nizam; FCs*

*For the Official Assignee - Nurulazeanie; FC*

*Reported by Suhainah Wahiduddin*

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## JUDGMENT

**Hasnah Mohammed Hashim J:**

**[1]** This is the judgment debtor's (JD) appeal against the decision of the Senior Assistant Registrar dated 3 August 2015 granting the receiving order
I and adjudication order (RO/AO).

**The Cause Papers**

**[2]** The relevant documents referred to are as follows:

(i) the Kuala Lumpur High Court Suit No: D6-22-2945-1998 consent judgment dated 21.12.2011 ("Consent Judgment");

(ii) the Judgment Creditor's Application for Issuance of the Bankruptcy Notice dated 22.05.2013 ("the Application for Issuance of the Bankruptcy Notice");

(iii) the Bankruptcy Notice dated 22.06.2013 ("the Bankruptcy Notice");

(iv) the Judgment Creditor's Affidavit for Service of the Bankruptcy Notice affirmed by Muhammad Syafiq bin Omar on 21.06.2013 (Affidavit for Service");

(v) the Judgment Creditor's Application dated 10.09.2013 ("the Creditor's Petition");

(vi) the Judgment Creditor's Affidavit Verifying the Truth in respect of the Creditor's Petition affirmed by Leong Chin Soon on 05.09.2013 ("the Affidavit Verifying the Creditor's Petition");

(vii) the Judgment Creditor's Affidavit for Service of the Creditor's Petition affirmed by Zainal bin Raja Aisa on 01.11.2013 ("the Judgment Creditor's Affidavit for Service of the Creditor's Petition");

(viii) the Judgment Creditor's Affidavit for Service to the Insolvency Department affirmed by Muhammad Syafiq bin Omar on 01.11.2013 ("the Judgment Creditor's 2nd Affidavit for Service"); and

(ix) the Judgment Debtor's Notice of Appeal dated 17.08.2015 ("Notice of Appeal").

**The Grounds Of Appeal**

**[3]** The grounds of appeal are as follows:

(i) the Registrar had erred in law and fact in failing to observe and/or comply with the procedure as expressly provided for in the provisions of the Bankruptcy Act 1967 by simultaneously granting the receiving order and adjudication order; and

(ii) the Registrar had erred causing injustice to the judgment debtor in failing to grant an adjournment as sought by the judgment debtor on the grounds that the judgment debtor and the judgment creditor were in the midst of negotiations to resolve the matter amicably.

**Salient Facts**

**[4]** Sometime in 1997, the JD was granted a RM80.1 million syndicated term loan by six financial institutions which included the JC. In 1998, the JD defaulted and the JC initiated an action against the JD for the sum of RM81,055,875.73 being the sum due and owing against the JD (Kuala Lumpur High Court Suit No. D6-22-2945-1998).

**[5]** On 21 December 2011, a consent judgment (CJ) was entered in the aforesaid suit between the parties. The JD was given six months to negotiate settlement. The terms of the CJ are as follows:

> (1) Judgment is hereby entered against the Defendant for the following sums:
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> (a) RM81,055,875.73;
>
> (b) Interest on the aforesaid sum of RM81,055,875.73 at the rate of 18.25% per annum on RM22,067,091.35, 15.8% on RM21,751,626.10, 15. 8% per annum on RM13,594,710.27, 15.8% per annum on RM12,688,336.53, 15.8% per annum on RM5,438,315.47 and 18.25% per annum on RM5,515,796.01 from 11.06.1998 until the date of full settlement; and
>
> (c) Costs.
>
> (2) the Defendant is hereby given a period of 6 months from the date of this Consent Judgment to negotiate a settlement which is acceptable to the Plaintiff and the Syndicated Lenders. In the event a settlement cannot be reached within the said period of 6 months, the Plaintiff shall be entitled to enforce this Consent Judgment against the Defendant.

**[6]** The JD failed to satisfy the terms of the said CJ. The JC then proceeded with the bankruptcy proceedings against the JD. The JC filed for an application for the issuance of the bankruptcy notice dated 22 May 2013 ("bankruptcy notice"). The bankruptcy notice was served on the JD on 13 June 2013.

**[7]** Subsequently the JC filed a creditor's petition (CP) on 10 September 2013 together with an affidavit verifying the said petition affirmed by one Leong Chin Soon on behalf of the JC on 5 September 2013. The CP was served on the judgment debtor on 29 October 2013 and fixed for hearing before the Registrar on 11 November 2013.

**[8]** The hearing of the CP, however, was adjourned a total of 12 times on the grounds that the parties (the JD and the other syndicated lenders) were attempting to resolve the matter amicably. The learned Registrar allowed the JD's request for adjournment and fixed the final hearing of the CP on 3 August 2015. The CP was finally heard on 3 August 2015 where both parties appeared before the learned Registrar.

**[9]** On 3 August 2015, the solicitors appearing on behalf of the JD again applied for an adjournment of the hearing of the CP giving the same reason as the previous hearing dates, ie, the parties were in the midst of negotiation and the JD was waiting for a response to his offer made on 19 June 2015. Furthermore, the solicitors were just appointed by the JD and it was their first appearance in court for the hearing of the CP. The adjournment sought by the JD was objected by the JC as the hearing of the CP had been adjourned on many occasions.

**[10]** After hearing both parties, the learned Registrar refused the application for an adjournment of the matter for the simple reason the hearing of the CP had been adjourned 12 times based on the same reason. The learned Registrar then proceeded with hearing of the CP and granted the RO and AO simultaneously against the JD.

**[11]** Dissatisfied with the decision of the learned Registrar, the JD filed an appeal against the said decision.

**Decision**

**[12]** The notice of bankruptcy filed by the JC is based on the CJ. Section 3(1) of the BA provides as follows:

> A debtor commits an Act of bankruptcy in each of the following cases:
>
> ...
>
> ...
>
> (i) if a creditor has obtained a final judgment or final order against him for any amount and execution thereon not having been stayed has served on him in Malaysia, or by leave of the court elsewhere, a bankruptcy notice under this Act requiring him to pay the judgment debt or sum ordered to be paid in accordance with the terms of the judgment or order with interest quantified up to the date of issue of the bankruptcy notice, or to secure or compound for it to the satisfaction of the creditor or the court; and he does not within seven days after service of the notice in case the service is effected in Malaysia, and in case the service is effected elsewhere then within the time limited in that behalf by the order giving leave to effect the service, either comply with the requirements of the notice or satisfy the court that he has a counterclaim, set off or cross demand which equals or exceeds the amount of the judgment debt or sum ordered to be paid and which he could not set up in the action in which the judgment was obtained or in the proceedings in which the order was obtained:
>
> Provided that for the purposes of this paragraph and of section 5 any person who is for the time being entitled to enforce a final judgment or final order shall be deemed to be a creditor who has obtained a final judgment or final order; …

**[13]** Section 3(2)(ii) of the BA further provides:

> (2) A bankruptcy notice under this Act shall be in the prescribed form and shall state the consequences of non compliance therewith and shall be served in the prescribed manner:
>
> Provided that a bankruptcy notice:
>
> (i) may specify an agent to act on behalf of the creditor in respect of any payment or other thing required by the notice to be made to or done to the satisfaction of the creditor; and

A (ii) shall not be invalidated by reason only that the sum specified in the notice as the amount due exceeds the amount actually due unless the debtor within the time allowed for payment gives notice to the creditor that he disputes the validity of the notice on the ground of such mistake; but if the debtor does not give such notice he shall be deemed to have complied with the bankruptcy notice, if within
B the time allowed he takes such steps as would have constituted compliance with the notice had the actual amount due been correctly specified therein.

**[14]** Gopal Sri Ram JCA (as he then was) in *J Raju M Kerpaya v. Commerce International Merchant Bankers Bhd* [2000] 3 CLJ 104 said:

C When determining an issue under the Act, it is incumbent upon the court to accord its provisions a strict construction. The consequence of such an approach to construction is that a bankruptcy notice that requires a debtor to pay a judgment debt otherwise than in accordance with the terms of the judgment founded is null and *void ab initio*. Hence, a debtor does not
D commit an act of bankruptcy if he makes default upon such a notice. A challenge on the ground that a bankruptcy notice requires a debtor to pay a judgment debt otherwise than in accordance with the terms of the judgment may be taken at any time after service of the notice. A debtor who seeks to set aside a bankruptcy notice on the ground that it requires him to pay a judgment debt otherwise than in accordance with the terms
E of the judgment, must make an application in that behalf in accordance with r. 18 of the Rules.

A debtor who seeks to challenge the validity of a bankruptcy notice is also entitled to proceed under r. 95 of the Rules. However, if does so, he must show that he has a counterclaim, set off or cross demand which equals
F or exceeds the amount of the judgment debt which he could not set up in the action in which the judgment was obtained. Further, he must act within the time limit prescribed by s. 3(1)(i) of the Act. A debtor who seeks to challenge a bankruptcy notice on the ground that the amount specified therein exceeds the amount actually due, must act in accordance with proviso (ii) to s. 3(2) of the Act. Hence, he must, within the time prescribed
G in the bankruptcy notice give notice in writing to the creditor that he disputes the validity of the notice on the ground that it mistakenly claims an amount larger than that lawfully due.

A debtor who opposes a creditor's petition must comply with the procedure prescribed by r. 117 of the Rules. If he does not do so, any
H challenge he may mount is liable to fail for non-compliance of the Rules.

**[15]** I am satisfied that the Registrar had considered the affidavit verifying the petition and was satisfied with the proof of the petitioning creditor's debt and made a RO against the JD. The CP was not even challenged by the JD.

**[16]** Section 4 of the BA provides that if the debtor committed an act of
I bankruptcy, the court may on the petition being presented make an order for the protection of the estate. Section 24(1) of the BA stipulates that at the time

of making the RO, the court shall adjudge the debtor bankrupt unless the debtor can show to the satisfaction of the court that he is in a position to offer a composition or scheme of arrangement satisfactory to his creditors:

> At the time of making a receiving order the court shall adjudge the debtor bankrupt unless the debtor can show to the satisfaction of the court that he is in a position to offer a composition or make a scheme of arrangement satisfactory to his creditors; provided that when a receiving order is made against a firm in the firm's name the court shall not adjudge any person bankrupt as a member of the firm unless such person is proved to the satisfaction of the court to be a partner by his own admission or by evidence on oath.

**[17]** In the instant case the CP, at the request of the JD, was adjourned more than 12 times. No scheme of arrangement or composition satisfactory to the creditors was ever presented or submitted as evidence before the learned Registrar as required by s. 24(2) of the BA.

**[18]** Section 15 BA states that "…as soon as may be after the making of a receiving order against a debtor a general meeting of his creditors, in this Act referred to as the first meeting of creditors, shall be held for the purpose of considering whether a proposal for a composition or scheme of arrangement shall be entertained, or whether it is expedient that the debtor be adjudged bankrupt, and generally as to the mode of dealing with the debtor's property." It is the submission of learned counsel for the JD that the first meeting of the creditors must be called first before an AO is made.

**[19]** Section 15 of the BA does not prevent the court from entering RO and AO. Rule 114(1) of the Bankruptcy Rules 1969 reads:

> (1) Where a petition is filed by a debtor, the Court shall forthwith make a receiving order and may make an order of adjudication.

**[20]** It is trite law that adjournment is an absolute discretion of the court. This principle was laid down in the case of *Go Pak Hoong Tractor and Building Construction v. Syarikat Pasir Perdana* [1981] 1 LNS 184; [1982] 1 MLJ 77 where the Federal Court held:

> The granting of an adjournment is in the absolute discretion of the court depending on the facts of each case. Unless it can be shown that the discretion was improperly exercised it should not be disturbed.

**[21]** The learned Registrar had granted a total of 21 adjournments. I am of the considered view that the learned Registrar was very generous in granting the 12 adjournments.

**[22]** Furthermore, the JD did not provide any documentary evidence that there is a scheme of arrangement or composition satisfactory to the creditors. I am of the considered view that the learned Registrar was right in refusing the adjournment, proceeding with the CP and making the RO and AO simultaneously.

**[23]** Rule 150(1) of the aforesaid Rules provides that when "… a receiving order has been made any creditor or the official assignee may apply to the court to adjudge the debtor bankrupt." Section 15(1) of the BA and r. 150 of the said Rules do not prohibit the learned Registrar from making such an order. Justice Siti Norma Yaakob J (as she then was) in *Re Mat Shah bin Safuan, ex p United Asian Bank Bhd* [1990] 1 LNS 115; [1991] 1 MLJ 48 at p. 50 said that both s. 15(1) of the BA and r. 150(2) do not prohibit the Registrar from making an adjudication order immediately after the RO has been made. At the hearing of the CP, the JD's offer to settle was not accepted by the JC and the other syndicated lenders. The JD did not make any attempt to provide any information or satisfy the court that there is a proposed scheme of arrangement.

**[24]** The CP was supported by an affidavit verifying the CP and the learned Registrar had relied on the said affidavit to prove the debt owing. Furthermore, the JD did not even challenge the CP and the affidavit verifying.

**Conclusion**

**[25]** Guided by the principles enunciated in the above cases and having considered the written submissions as well as the authorities by both counsel, this court is of the considered view that the learned Registrar had applied the correct law and did not err when she made the RO and the AO simultaneously. Therefore based on the reasons mentioned above, I find no merits in the appeal of the JD. The appeal is dismissed with costs.